

4. Plaintiff's Petition and Amended Petition against defendants alleges that Plaintiff was injured when he was struck by a railroad car/engine operated by BNSF, an object protruding therefrom, or an item of cargo that fell out of the passing train.

5. Plaintiff's Petition alleges that Defendants, BNSF and Randy R. McQueary, a Roadmaster for BNSF, were negligent, careless and reckless:

- a) in allowing an object to protrude from Defendant BNSF's cars/engines in a manner that threatens the life, limb, property or persons of pedestrians, including Plaintiff;
- b) in failing to secure an item of cargo, allowing it to protrude from Defendant BNSF's cars/engines in a manner that threatens the life, limb, property or persons of pedestrians, including Plaintiff;
- c) in failing to properly secure an item of cargo, allowing it to protrude from Defendant BNSF's cars/engines in a manner that threatens the life, limb, property or persons of pedestrians, including Plaintiff;
- d) in failing to provide warnings to pedestrians, including Plaintiff, standing near railroad crossings with adjacent sidewalks of a risk of being hit by objects protruding from or falling out of passing railroad cars/engines and/or a general warning to stand back from passing trains;
- e) in failing to provide signage directing where pedestrians, including Plaintiff, should safely stand at the crossing which is the subject of this litigation; and
- f) in failing to provide signs warning pedestrians, including Plaintiff, of "no trespass" or barriers of any kind to indicate to pedestrians where Defendant BNSF's property at the subject crossing begins and/or ends.

6. Plaintiffs' joinder of McQueary is fraudulent and McQueary must be dismissed as a party defendant herein because none of the allegations against him have any basis in law or fact, and there is no reasonable possibility that plaintiff can state a cause of action against McQueary. *See Ross v. Citifinancial, Inc.*, 344 F.3d 458, 462-63 (5th Cir. 2003); *Filla v. Norfolk Southern Ry. Co.*, 336 F.3d 806 (8th Cir. 2003); *Travis v. Irby*, 326 F.3d 644, 648 (5th Cir. 2003); *Schwartz v. State Farm Mut. Auto Ins. Co.*, 174 F.3d 875, 878 (7th Cir. 1999).

7. Defendant has submitted herewith and incorporates herein a Memorandum of Law in support of this motion.

WHEREFORE, Defendant, Randy R. McQueary, respectfully requests that this Court find that he was fraudulently joined herein and DISMISS him as a party defendant to this action.

Respectfully submitted,

/s/Thomas E. Jones

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CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2011, the foregoing was filed electronically with the Clerk of Court to be served by operation of the Court's electronic filing system upon the following:

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/s/Thomas E. Jones